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No.

IN THE
# Supreme Court of the United States

LINWOOD CHARLES MATHIAS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

Rudolph Alexander Ashton, III
McCotter, Ashton & Smith, PA
P.O. Box 12800
New Bern, N.C. 28561
(252) 635-1005

Robert A. Long, Jr.
*Counsel of Record*
Theodore P. Metzler, Jr.
Nicholas Cartier
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

*Counsel for Petitioner*

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## QUESTION PRESENTED

Whether a conviction under Va. Code Ann. § 18.2-479(B) for escape "other than by force or violence" is a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e), when the defendant's escape involved the failure to return from a work release program?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit held that Petitioner's conviction for a "walkaway escape" during a work release was a "violent felony" that requires a mandatory fifteen-year sentence.

The Fourth Circuit's decision is in conflict with a decision of the Ninth Circuit, which has held that a walkaway escape is not categorically a "crime of violence" because it does not necessarily involve "conduct that presents a serious potential risk of physical injury to another." The Fourth Circuit's decision is in accord with decisions of several other courts of appeals, but is in tension with the views of a growing chorus of federal appellate judges, expressed in majority opinions of the Seventh and D.C. Circuits and concurring opinions of the Tenth and Eleventh Circuits. Certiorari should be granted to resolve the split among the circuits on this important issue of federal law.

## OPINIONS BELOW

The opinion of the court of appeals, Pet. App., *infra*, 1a-11a, is reported at 482 F.3d 743. The order of the district court, *id.* at 12a-21a, was unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 13, 2007. *Id.* at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act, codified in part at Section 922(g) of Title 18, states, in relevant part:

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1)

Section 924(e) of Title 18 states, in relevant part:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by

> imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e)

Section 4B1.2 of the United States Sentencing Guidelines states, in pertinent part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that —
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Section 479 of Title 18.2 of the Virginia Code, entitled "Escape without force or violence or setting fire to jail," provides, as relevant here:

> B. Any person, lawfully confined in jail or lawfully in the custody of any court, officer

> of the court, or of any law enforcement officer on a charge or conviction of a felony, who escapes, other than by force or violence or by setting fire to the jail, is guilty of a Class 6 felony.

Va. Code Ann. § 18.2-479(B).

## STATEMENT OF THE CASE

This case presents an important and recurring question on which the federal courts of appeals are divided. The Armed Career Criminal Act ("ACCA") provides a mandatory minimum sentence of fifteen years for any person who is convicted of being a felon in possession of a firearm if that person has three prior convictions for a "violent felony." Similarly, the United States Sentencing Guidelines provide increased sentences for specific crimes if the defendant has prior felony convictions for a "crime of violence," and designate a defendant convicted of a "crime of violence" with at least two such prior convictions as a "career offender." The statutory definitions of "violent felony" and "crime of violence" are identical in relevant part, and the courts of appeals treat them interchangeably. The circuits have split over whether escape is a crime that categorically "involves conduct that presents a serious potential risk of physical injury to another," and thus is a "violent felony" under the Armed Career Criminal Act and a "crime of violence" under the Sentencing Guidelines.

1. **Meaning Of "Violent Felony" Under The Armed Career Criminal Act.** Section 922(g)(1) of Title 18 prohibits, among other things, possession of a firearm by a felon. Under section 924(a)(2) of Title 18, a defendant convicted of being a felon in possession of a firearm is subject to a maximum sentence of ten years. If that same defendant, however, has three prior convictions for a "violent felony," he is subject to a mandatory minimum sentence of fifteen years under section 924(e).

A "violent felony" is defined as an offense punishable by imprisonment for more than a year that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. . . .

18 U.S.C. § 924(e)(2)(B).

To determine whether a crime is a violent felony, courts use the "categorical approach" adopted by this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990). Under this approach, a court generally will "look only to the fact of conviction and the statutory definition of the prior offense," as opposed to the particular facts underlying the crime. *Id.* at 600, 602 (footnote omitted). If it is not clear from the statute whether the conviction is a crime of violence, a court may look to the charging documents and jury instructions. *Id.* at 602; *see also Shepard* v. *United States*, 544 U.S. 13, 16 (2005) (court may consider written plea agreement, transcript of plea colloquy, and explicit factual findings by the trial judge to which the defendant assented).

Where, as here, the offense does not have "as an element the use, attempted use, or threatened use of physical force against the person of another," is not "burglary, arson, or extortion," and does not "involve [the] use of explosives," the sole question is whether the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." Recently, in *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007), this Court addressed the proper analysis for determining whether a conviction is a violent felony under this "residual provision." Employing the categorical approach of *Taylor* and *Shepard*, the Court stated, "the proper

inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *Id.* (emphasis added).

**2. Definition Of "Crime Of Violence" Under The Sentencing Guidelines.** Section 4B1.2 of the Sentencing Guidelines defines a "crime of violence" in relevant part as an offense that is punishable by imprisonment for more than a year and:

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a). This definition is materially identical to the definition of "violent felony" contained in the Armed Career Criminal Act. Both definitions contain the same residual provision for an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2).

The courts of appeals uniformly construe "violent felony" under the Armed Career Criminal Act and "crime of violence" under the Sentencing Guidelines to have the same meaning. *See, e.g., United States* v. *Nolan*, 397 F.3d 665, 666 (8th Cir. 2005); *United States* v. *Jackson*, 301 F.3d 59, 62 (2nd Cir. 2002); *United States* v. *Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999); *see also United States* v. *Taylor*, No. 06-13139, 2007 U.S. App. Lexis 13822, at *6 n.4 (11th Cir. June 13, 2007) (Hill, J., concurring) ("[C]ourts uniformly treat 'crimes of violence' under the

Guidelines and 'violent felonies' under the ACCA the same").[1]

Section 4B1.2's definition of "crime of violence" is employed in numerous sections of the Sentencing Guidelines, including Section 4B1.1, which provides that a defendant is a "career offender" subject to a higher sentencing range if (1) the defendant was at least eighteen years old at the time of the instant offense of conviction, (2) the offense is a felony that is "either a crime of violence or a controlled substance offense," and (3) the defendant has at least two prior felony convictions for "either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a).[2] A defendant sentenced as a career offender is subject to the offense level contained in Section 4B1.1 if this results in an offense level "greater than the offense level otherwise applicable." *Id.* § 4B1.1(b).

In determining whether an offense qualifies as a "crime of violence" under the Sentencing Guidelines, courts apply the categorical approach adopted by *United States* v. *Taylor* and its progeny. *See, e.g., United States* v. *Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006).

**3. This Case**. Petitioner Linwood Charles Mathias pleaded guilty to being a felon in possession of a firearm and to aiding and abetting the same conduct, in violation of 18 U.S.C. §§ 922(g)(1), 924 and 2, based on his

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[1] A defendant convicted of being a felon-in-possession of a firearm whose is subject to the fifteen-year minimum sentence enhancement under the Armed Career Criminal Act may be subject to the offense level prescribed in the career offender sentencing guideline. *See* U.S.S.G. § 4B1.4(b)(2).

[2] Other Guidelines provide for increased sentences for prior convictions of a "crime of violence." *E.g.*, U.S.S.G. §§ 2K1.3(a), 2K2.1(a).

role in the armed robbery of a payday lender. Pet. App., *infra*, 3a-4a.

At the time of the robbery, Mathias had two prior felony convictions for burglary and a Virginia felony conviction for escape by walking away from a work release program. *Id.* at 4a. The Presentence Report characterized each of these prior convictions as "violent felonies," resulting in the minimum fifteen-year sentence enhancement under the ACCA. *Id.* Before the district court, Mathias conceded that his two burglary convictions qualified as violent felonies, but he argued that his escape conviction did not. *Id.* at 4a, 27a. He noted that the statute under which he was convicted, Va. Code Ann. § 18.2-479(B), is entitled "Escape without force or violence or setting fire to jail." *Id.* at 2a, 4a, 27a.

**4. The District Court's Order.** The district court had jurisdiction pursuant to 18 U.S.C. § 3231. It rejected Mathias's argument, finding that his escape conviction was a violent felony under the ACCA regardless of its classification under state law. *Id.* at 4a. Although the court sentenced Mathias to the minimum fifteen-year sentence, it decided against imposing the longer sentence prescribed by the advisory guideline range. *Id.* at 24a-25a. It stated that "Defendant's history of treatment for psychological ailments militates against a sentence within the advisory guideline range. Accordingly, the Court will enter a non-guideline sentence." *Id.* at 24a.

**5. The Fourth Circuit's Decision.** The Fourth Circuit affirmed. *Id.* at 2a-3a. The Court began its analysis by stating that it would follow the "categorical approach" and consider only the statutory definition of the escape offense. *Id.* at 6a. The court noted that the Virginia law under which Mathias was convicted does not

include as an element "'the use, attempted use, or threatened use of physical force.'"[3] *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i)). Accordingly, it explained the offense would qualify as a violent felony only if it "'otherwise involves conduct that presents a serious risk of physical injury to another.'" *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).

The Court found that Mathias's escape conviction met this standard, writing that "any escape, even an escape by stealth, inherently presents the serious potential risk of physical injury to another." *Id.* at 7a (internal quotation marks omitted). The Court did not address Mathias's argument that the Virginia Code includes a companion statute for "escape by force or violence," Va. Code Ann. § 18.2-477, which, unlike § 18.2-479(B), requires a consecutive sentence.[4] *Id.* at 28a. Instead, the court rested its decision on two basic grounds. *First*, it found that the act of escape itself involves a serious potential risk of violence, since "there is always a chance that an escape attempt will be interrupted — by a prison guard, work supervisor, or citizen bystander." *Id.* at 9a. *Second*, it stated that "[e]ven if the escape itself could somehow sidestep any

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[3] Virginia Code § 18.2-479(B) states: "Any person, lawfully confined in jail or lawfully in the custody of any court, officer of the court, or of any law enforcement officer on a charge or conviction of a felony, who escapes, other than by force or violence or by setting fire to the jail, is guilty of a Class 6 felony."

[4] Virginia Code § 18.2-477 provides: "If any person confined in jail or in custody after conviction of a criminal offense shall escape by force or violence, other than by setting fire thereto, he shall be guilty of a Class 6 felony. The term of confinement under this section shall commence from the expiration of the former sentence."

potential risk of injury, the circumstances of recapture necessarily encompass just such a risk." *Id.*

The Court noted that its holding conflicts with the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (9th Cir. 2006), but is in accord with the decisions of the other courts of appeals that have addressed whether an escape conviction is a violent felony under the Armed Career Criminal Act or a crime of violence under the Sentencing Guidelines. *Id.* at 7a-8a, 8a n.2.

## REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question in a way that conflicts with decisions of other courts of appeals. Further review by this Court is warranted to resolve the conflict in the lower courts and restore the uniformity of federal law.

### I. The Fourth Circuit's Opinion Conflicts With The Ninth Circuit.

#### A. The Ninth Circuit Holds That Escape Is Not Categorically A "Crime Of Violence."

In *United States* v. *Piccolo*, the Ninth Circuit held that a conviction under the federal escape statute, 18 U.S.C. § 751(a), does not categorically involve "conduct that presents a serious potential risk of physical injury to another," and therefore is not a "crime of violence" for purposes of the career offender enhancement guideline, U.S.S.G. § 4B1.1. *See* 441 F.3d 1084, 1085 (9th Cir. 2006). Like this case, *Piccolo* involved a "walkaway escape." *Id.* The defendant in *Piccolo* failed to return to a non-secure halfway house after attending a drug treatment meeting, although he voluntarily turned himself in on a later date. *Id.*

The Ninth Circuit explained that it would apply the categorical approach of *Taylor*, which required it to

look only to the statutory definition of the offense. *Id.* at 1086. The court observed that the federal escape statute "does not differentiate between violent and non-violent escapes; the statutory definition of the crime runs the gamut from maximum-security facilities to non-secure halfway houses." *Id.* at 1088. Because the elements of the statute did not include the use, attempted use, or threatened use of physical force, the offense, like the Virginia escape statute in this case, would only qualify as a "crime of violence" if it involved "conduct that presents a serious potential risk of physical injury to another." *Id.* at 1086 (quoting U.S.S.G. § 4B1.2(a)(2)).

The Court held that a walkaway escape is "of an entirely different order of magnitude than escapes from jails and prisons."[5] *Id.* at 1088. Residents who leave a halfway house "without returning do not pose an automatic risk of danger and therefore do not categorically raise a serious potential risk of physical harm." *Id.* The court recognized that other courts of appeals had found that escape, even a non-violent walkaway escape, constituted a "crime of violence" and a "violent felony" under the ACCA. *Id.* at 1089-90. It noted that the majority of these decisions had adopted the language of the Tenth Circuit in *United States* v. *Gosling*, likening escape to a "'powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the

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[5] The district court believed itself bound to treat all escapes as crimes of violence under the categorical approach. Nevertheless, it found that "the facts of Mr. Piccolo's case are about as far removed from a crime of violence of any — as any crime of violence I've personally had in front of me . . . . It's — this is a halfway house, he did walk away, there was no threat to anyone. . . ." *Piccolo*, 441 F.3d at 1085 (internal quotation marks omitted).

serious potential to do so.'" *Id.* at 1089 (quoting *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

The Court found "the powder-keg rationale adopted by other circuits proves too much." *Id.* "While an escapee who flees a secured facility or the custody of an armed guard presents a serious risk of injury to himself and others, the same cannot be said for an escapee who leaves a halfway house with permission and fails to return." *Id.* Therefore, because the federal escape statute criminalized walkway escapes that "could clearly take place on the basis of conduct that did not present a serious potential risk of physical injury to another," the conviction was not a crime of violence. *Id.* at 1088 (internal quotation marks omitted).

### B. A Growing Chorus Of Judges Agree That Escape Is Not Categorically A "Violent Felony" Or A "Crime Of Violence."

An increasing number of judges have urged that a distinction be made between escapes from jail and other situations of physical custody — which do pose a serious potential risk of physical injury — and walkaway and failure to return escapes, which do not. The skepticism of the majority view that *all* escape crimes are categorically violent felonies and crimes of violence can be traced to Judge McKay's concurrence in *United States* v. *Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999). There, the majority, following prior circuit precedent, held that a non-violent escape from a juvenile facility was a violent felony under the ACCA. *Id.* at 1118. In his concurrence, Judge McKay's took exception to the proposition that felony escape "always constitutes 'conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 1119 (quoting *United States* v. *Moudy*, 132 F.3d 618, 620 (10th Cir. 1998)).

Judge McKay noted that state law regularly defined felony escape to include a "failure to return to work release or other inmate release program." *Id.* He stated that he would make a distinction between escape from actual custody and the mere failure to return from authorized release. *Id.* "There is a quantum difference between the assumptions about the intrinsic danger of unauthorized departure from actual custody, as in this case, and of failure to return from authorized departure from actual custody." *Id*; *see also United States v. Springfield*, 196 F.3d 1180, 1186 (10th Cir. 1999) (McKay, J., concurring) (disputing that "escape is necessarily always a violent crime").

The D.C. Circuit has criticized the view that every escape crime presents a potential risk of physical injury. *United States* v. *Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003). In *Thomas*, the court reviewed a district court's holding that escape crimes are categorically crimes of violence.[6] *Id.* at 281. The Court did not need to reach that question, finding instead that the defendant's offense of escaping from an officer qualified as a crime of violence. *Id.* at 283.

The Court took issue with decisions of other courts of appeals that found that walkaway escapes inherently present a serious risk of physical injury based on the reasoning that even "'the most peaceful escape cannot eliminate the potential for violent conflict when the

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[6] Because of the trial court's holding, the defendant was subject to an enhanced sentence under U.S.S.G. § 2K2.1(a)(4)(A), which applies when the defendant's current conviction occurs "subsequent to sustaining one felony conviction of . . . a crime of violence . . . ." Section 2K2.1(a)(4)(a) relies upon the same definition of "crime of violence" used in the career offender sentencing guideline, U.S.S.G. § 4B1.2(a). *See Thomas*, 333 F.3d at 281.

authorities attempt to recapture the escapee.'" *Id.* at 282 (quoting *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001)). "Arguably, the approach taken by the other circuits proves too much." *Id.* "While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of *any* lawbreaker." *Id.* (emphasis added).

The Seventh Circuit recently expressed a similarly critical view. Judge Posner, writing for a unanimous panel in *United States* v. *Chambers*, stated that the required application of circuit precedent to the facts of the case was an "embarrassment to the law." 473 F.3d 724, 726 (7th Cir. 2007). At issue in the case was whether the defendant's Illinois state conviction for failing to report to a penal institution was a "violent felony" under the ACCA. *Id.* at 725. Judge Posner indicated that he did not believe that failing to report to prison, as distinct from escaping from a jail, prison or other form of custody, "was a crime that typically or often involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 725 (internal quotation marks omitted). Nevertheless, he stated that the panel was bound by prior circuit precedent, which had held that any violation of the Illinois statute qualifies as a "violent felony." *Id.* at 726.[7]

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[7] On May 8, 2007, a petition for certiorari was filed in *Chambers*. *Chambers* v. *United States* (No. 06-11206). The Illinois escape statute at issue in *Chambers* punishes both violent and non-violent escapes, *see Chambers*, 473 F.3d at 725, while the Virginia statute at issue in this case is expressly limited to non-violent escapes, Pet. App., *infra*, 6a. The Court may wish to grant review in this case instead of *Chambers*. Alternatively, the Court may wish to grant review in both cases and consolidate them for oral argument. *Cf. Lopez v. Gonzales* and *Toledo-Flores v. United States*, 547 U.S. 1054 (2006) (granting petitions for writs of certiorari in cases presenting parallel issues).

As Judge Posner observed, under the court's interpretation of the Illinois statute, "[y]ou could show up an hour late (without an excuse) and be guilty of a felony that could result in your receiving a fifteen-year mandatory minimum sentence under the Armed Career Criminal Act." *Id.* at 725.

Judge Posner wrote that, with the exception of the D.C. Circuit's reservation of the question in *Thomas*, and the holding of the Ninth Circuit in *Piccolo*, the remaining courts of appeals were in accord with the Seventh Circuit's prior precedent. *Id.* at 726. He observed that all of these cases involved either a failure to return to a halfway house, or a walkaway escape, "which does not involve breaking out of a building or wrestling free of guards." *Id.* Following the reasoning of Judge McKay in *Adkins*, Judge Posner suggested that a distinction be made between "custodial" escapes from prison or physical custody, and "noncustodial" walkaway or failure to return escapes. *Id.* "There would be no impropriety in dividing escapes, for purposes of 'crime of violence' classification, into jail or prison breaks on the one hand and walkaways, failure to report, and failures to return, on the other. The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *Shepard* v. *United States*, to decide which bin a conviction for escape belonged in."[8] *Id.* (citation omitted). Judge Posner also noted that recent

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[8] Virginia's escape statutes make a clear distinction between escape with force or violence and escape without force or violence. *See supra* notes 3 and 4 and accompanying text. Petitioner was charged and convicted of escape "other than by force or violence" for his walkaway from a work release program. Pet. App., *infra*, 4a; Va. Code Ann. § 18.2-479(B). The Fourth Circuit in this case failed to address this distinction. *Supra* page 9.

research showed that almost ninety percent of all escapes are walkaways.[9]

Most recently, two members of an Eleventh Circuit panel added their voices to the "growing[] choruses of doubt that a district court is permitted to enhance a sentence under the ACCA based in part upon a 'failure to return' prior escape conviction." *United States* v. *Taylor*, No. 06-13139, 2007 U.S. App. LEXIS 13822, at *6 (11th Cir. June 13, 2007). A per curiam opinion in the case adhered to the court's prior precedent on the issue, but Judge Hill concurred *dubitante*, joined by Judge Wilson. Judge Hill wrote, "I wish to express my agreement with those who reject the rule that escape is categorically a violent felony." 2007 U.S. App. Lexis 13822, at *13 (discussing *Adkins*, *Thomas*, *Chambers* and *Piccolo*). Judge Hill acknowledged that the panel was bound by circuit precedent to treat the failure to return to a halfway house as a violent felony under the ACCA, but suggested that courts adopt a generic federal definition of escape, as this Court adopted a generic definition of burglary in *Taylor*. *Id.* at *13 n.8 (citing *Taylor*, 495 U.S. at 590). Following Judge Posner's suggestion, Judge Hill recommended that this definition distinguish between custodial escapes that would qualify as violent felonies, and non-custodial, failure to return escapes that would not. *Id.*

### C. The Fourth And Other Circuits Hold That Escape Is Categorically A "Violent Felony" or "Crime Of Violence."

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[9] *Chambers*, 473 F.3d at 727 (citing Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 278 (2005)).

The Fourth Circuit held in this case that *any* escape, even a walkway escape, "inherently presents the serious potential risk of physical injury to another." Pet. App., *infra*, 7a (internal quotation marks omitted). This decision is consistent with the decisions of most courts of appeals that have addressed whether escape is categorically a "violent felony" under the ACCA,[10] or a "crime of violence" under the Sentencing Guidelines.[11]

The Fourth Circuit's opinion, however, is in clear conflict with the Ninth Circuit's holding in *Piccolo* that a "walkaway escape could clearly take place on the basis of conduct that did not present a serious potential risk of physical injury to another." *Piccolo*, 441 F.3d at 1088

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[10] *See, e.g., United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002) (walkaway escape violent felony under ACCA); *United States* v. *Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999) (escape violent felony under ACCA); *United States* v. *Franklin*, 302 F.3d 722, 724-25 (7th Cir. 2002) (same); *United States* v. *Abernathy*, 277 F.3d 1048, 1051 (8th Cir. 2002) (walkaway escape); *United States* v. *Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999) (same).

[11] *See United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (failure to return to halfway house crime of violence); *United States* v. *Luster*, 305 F.3d 199, 202 (3rd Cir. 2002) (walkaway escape crime of violence); *United States* v. *Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996) (escape, by its nature, qualifies as crime of violence); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999) (walkaway escape); *United States* v. *Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999) (escape qualifies as crime of violence); *United States* v. *Bryant*, 310 F.3d 550, 554 (7th Cir. 2002) (failure to return to halfway house); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001) (escape qualifies as crime of violence); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002) (failure to return to halfway house); *United States* v. *Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001) (walkaway escape).

(internal quotation marks omitted).[12] The Fourth Circuit's opinion is also in tension with the views expressed by the majority opinions in *Thomas* (D.C. Circuit) and *Chambers* (Seventh Circuit), the concurring opinion of the majority panel in *Taylor* (Eleventh Circuit), and Judge McKay's concurring opinions in *Adkins* and *Springfield* (Tenth Circuit).

If Mathias's case had arisen in the Ninth Circuit he would not have been subjected to a mandatory minimum fifteen-year sentence.

## II. A Walk-Away "Escape" Is Not Categorically A Crime That "Presents A Serious Potential Risk Of Physical Injury To Another."

The reasons given by the courts of appeals for holding all escape crimes categorically involve "conduct that presents a serious potential risk of physical injury to another" are unpersuasive. Like the court of appeals' decision here, the other courts have generally relied on two arguments.

First, the courts adhere to (and often quote) the Tenth Circuit's statement that "every escape scenario is a powder keg, which may or may not explode into violence." *Gosling*, 39 F.3d at 1142.[13] As Judge Posner noted in *Chambers*, "This is conjecture floating well free of any facts — even the facts of *Gosling*." 473 F.3d at 727. While the Tenth Circuit's colorful metaphor may well describe a jailbreak scenario, it has little relevance to

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[12] As noted *supra* at pp. 6-7, the courts of appeals treat the definition of "violent felony" and "crime of violence" interchangeably.

[13] *See, e.g., Jackson*, 301 F.3d at 62; *Franklin*, 302 F.3d at 724; *Winn*, 364 F.3d at 11; *Luster*, 305 F.3d at 202; *Harris*, 165 F.3d at 1068.

crimes that involve walking away from a halfway house or failing to return or report.

*Second*, like the Fourth Circuit here, other courts have argued that recapturing an escapee "necessarily" poses a serious potential risk of physical injury.[14] Pet. App., *infra*, 9a. Again, this statement is belied by the reality of many walkaway "escapes." For instance, the defendant in *Piccolo* returned *voluntarily* after failing to return to a non-secure halfway house following a drug treatment meeting. 441 F.3d at 1085. As the D.C. Circuit stated in *Thomas*, some risk of physical injury exists in *any* capture of a lawbreaker, and thus under the Fourth Circuit's reasoning practically every crime would be classified as a violent felony under the Armed Career Criminal Act. *See* 333 F.3d at 282 ("While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of *any* lawbreaker.") (emphasis added).

Following the analysis recently employed by this Court in *James*, "the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." 127 S. Ct. at 1597 (emphasis added). As made clear by *Piccolo*, a walkaway "escape" from a work release program does not ordinarily present a "serious potential risk" of physical injury. 441 F.3d at 1088; *see also Adkins*, 195 F.3d at 1119 (McKay, J., concurring); *Springfield*, 196 F.3d at 1186 (McKay, J., concurring); *Thomas*, 333 F.3d at 282; *Chambers*, 473 F.3d at 726; *Taylor*, 2007 U.S. App. Lexis 13822, at *13 n.8.

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[14] *See, e.g., Jackson*, 301 F.3d at 63; *Franklin*, 302 F.3d at 724; *Winn*, 364 F.3d at 12; *Nation*, 243 F.3d at 472.

## III. The Question Presented Is Important And Recurring, And Will Not Benefit From Further Review In The Courts Of Appeals.

Almost every federal court of appeals has addressed whether escape crimes categorically involve "conduct that presents a serious potential risk of physical injury to another," and are therefore "violent felonies" or "crimes of violence." The substantial number of appellate cases that have addressed the question presented attests that it is a recurring issue. The question is also important. Nearly ninety percent of all escapes involve walkaways rather than potentially violent jailbreaks. *Chambers*, 473 F.3d at 727. Review in this case would provide important guidance to the lower courts. *See James*, 127 S. Ct. at 1601 (Scalia, J., dissenting).

The question presented is not likely to benefit from further consideration in the courts of review. Although most circuits have held that escapes are categorically "crimes of violence" or "violent felonies," a growing chorus of judges takes the opposite view. Further consideration by the lower courts will likely exacerbate, rather than ameliorate, the conflict among the courts of appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert A. Long, Jr.
*Counsel of Record*
Theodore P. Metzler, Jr.
Nicholas Cartier
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

Rudolph Alexander Ashton, III
McCotter, Ashton & Smith, PA
P.O. Box 12800
New Bern, N.C. 28561
(252) 635-1005

*Counsel for Petitioner*

July 12, 2007

APPENDIX

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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United States of America,
*Plaintiff-Appellee,*

v.

Linwood Charles Mathias,
Defendant-Appellant.

No. 06-4109

Appeal from the United States District Court
for the Eastern District of North Carolina, at Elizabeth City.

Terrance W. Boyle, District Judge.
(CR-04-41-BO)

Argues: January 31, 2007

Decided: April 13, 2007

Before WILKINSON, NIEMEYER, and SHEDD, Circuit Judges.

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Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Niemeyer and Judge Shedd joined.

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## COUNSEL

**ARGUED:** Rudolph Alexander Ashton, III, MCCOTTER, ASHTON & SMITH, P.A., New Bern, North Carolina, for Appellant. John Stuart Bruce, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** George E. B. Holding, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Christine Witcover Dean, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

## OPINION

WILKINSON, Circuit Judge:

This case presents the question of whether escape qualifies as a "violent felony" under the Armed Career Criminal Act ("ACCA") when the escape did not involve force or violence. In connection with the armed robbery of National Cash Advance, a payday lending service, Linwood Mathias was indicted as a felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) (2000 & Supp. 2004). He pled guilty. During sentencing, the district court held that Mathias' three prior convictions — two for burglary and one for felony escape — were "violent felon[ies]" under the ACCA. The court thus designated Mathias an armed career criminal and sentenced him to the statutory minimum: fifteen years imprisonment.

Mathias appeals this sentence. He contends that he should not have been classified as an armed career criminal because the circumstances of his case involved nothing more than a walkaway from a work release program and because his escape conviction was under a Virginia law titled "Escape without force or violence." We disagree. Because every escape "involves conduct that

presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(1) (B)(ii) (2000), Mathias' escape conviction is a "violent felony" under the ACCA. We therefore affirm Mathias' sentence.

I.

Linwood Mathias and codefendants Antonio Cooper and Terry Deberry executed an armed robbery of National Cash Advance, a payday lender in Elizabeth City, North Carolina.[1] On August 23, 2004, defendants met at Cooper's residence. Deberry then drove Mathias and Cooper to National Cash Advance in the 1994 Ford Explorer he had stolen for the occasion.

Mathias and Cooper, both armed, entered the lending business. National Cash Advance manager Joann Godfrey was in the store along with her eighteen-year-old daughter and three-year-old son. Cooper demanded money and Mathias and Cooper brandished loaded firearms--Mathias a Glock 9 millimeter semi-automatic pistol and Cooper a Colt Cobra .38 Special caliber revolver. Cooper took $ 300 from the money drawer and Mathias escorted Godfrey and her children to a back room. Godfrey was told to remain in the back room for at least fifteen minutes and Mathias and Cooper joined Deberry in the getaway vehicle.

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[1] Codefendant Cooper pled guilty to possession of a firearm by a convicted felon and aiding and abetting the same conduct. He was sentenced to 120 months' imprisonment. Cooper appealed. This court affirmed, finding Cooper's sentence to be reasonable. *United States* v. *Cooper*, 211 Fed. Appx. 193, 2006 U.S. App. LEXIS 31990, 2006 WL 3827561, at *1 (4th Cir. Dec. 28, 2006). Codefendant Deberry also pled guilty to possession of a firearm by a convicted felon and aiding and abetting; he was sentenced to 120 months' imprisonment. On appeal, this court affirmed Deberry's conviction and sentence. *United States* v. *Deberry*, 173 Fed. Appx. 306, 307 (4th Cir. Apr. 4, 2006).

Law enforcement officers, having been alerted by a National Cash Advance customer, attempted to stop the Ford Explorer minutes after it left the lender's parking lot. Deberry refused to pull over. He instead exited the still-moving vehicle and fled on foot. Cooper began driving with Mathias in the vehicle. He led the officers on an eleven mile high-speed chase that ended when Cooper crashed the Ford Explorer into the back of a police car. The Glock 9 millimeter semi-automatic pistol and Colt Cobra .38 Special caliber revolver were found near the passenger seat of the stolen Explorer.

At the time of the armed robbery, Mathias was a convicted felon. On November 10, 2004, he was indicted as a felon-in-possession and of aiding and abetting the same conduct in violation of 18 U.S.C. §§ 922(g)(1), 924, and 2. Mathias pled guilty to the felon-in-possession and aiding and abetting charges on July 12, 2005.

The Presentence Investigation Report catalogued Mathias' extensive criminal history. Most pertinently, the PSR identified three prior "violent felony" convictions: two for burglary and one for felony escape. With respect to the felony escape conviction, the PSR noted that Defendant Mathias had walked away from a work release program in violation of Virginia Code § 18.2-479(B). Mathias objected to the violent felony classification of his prior Virginia escape conviction and argued that the conviction was a nonviolent one under Virginia law. The district court disagreed. The court held that Mathias' escape conviction was a violent felony for purposes of the ACCA regardless of its classification under state law. The court then adopted without modification the PSR, designated Mathias an armed career criminal, and imposed the mandatory minimum sentence of fifteen years imprisonment required by the ACCA.

Mathias now appeals.

II.

The Armed Career Criminal Act imposes heightened sentences on individuals who by repeated conduct have demonstrated an unwillingness to abide by basic social norms as expressed in state and federal criminal codes. Under the statute, any person who violates the felon-in-possession statute, 18 U.S.C. § 922(g), and has three previous "violent felony" convictions must be designated an armed career criminal. 18 U.S.C. § 924(e)(1). This designation carries a mandatory sentence of not less than fifteen years. Id. The ACCA, 18 U.S.C. § 924(e)(2)(B), defines the term "violent felony" as any crime punishable by imprisonment for more than one year that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another," or (2) "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

Mathias concedes that his two prior burglary convictions are "violent felon[ies]" under the Armed Career Criminal Act and qualifying predicate offenses for an armed career criminal designation. He contends, however, that his felony escape conviction does not constitute a "violent felony," and that the district court's imposition of the ACCA's statutory minimum fifteen-year sentence was unlawful. We review de novo the district court's conclusion that Mathias' escape conviction qualifies as a "violent felony." United States v. Green, 436 F.3d 449, 456 (4th Cir. 2006).

A.

Mathias first argues that his escape conviction does not constitute a "violent felony" under the ACCA because the particular circumstances of his escape -- he walked away from a work release program -- presented no risk of serious injury. He urges us to "loo[k] beyond the

definition of the charging document and statute" and parse the underlying factual basis of his conviction.

This argument ignores settled law: in this circuit, as in others, the question of whether an escape is a "violent felony" is a categorical one. *See, e.g.*, *United States* v. *Wardrick*, 350 F.3d 446, 454 (4th Cir. 2003); *United States* v. *Hairston*, 71 F.3d 115, 117 (4th Cir. 1995); *see also Taylor* v. *United States*, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). Under the categorical approach, we consider the nature of the offense as defined by statute, not the conduct and circumstances underlying a specific conviction. *Wardrick*, 350 F.3d at 454; *Hairston*, 71 F.3d at 117; *see also Taylor*, 495 U.S. at 602.

The question, therefore, is whether escape as codified in Virginia Code § 18.2-479(B) is a "violent felony." *See United States* v. *Kirksey*, 138 F.3d 120, 124 (4th Cir. 1998); *Hairston*, 71 F.3d at 117. Because escape under this provision does not itself involve "the use, attempted use, or threatened use of physical force" as required by 18 U.S.C. § 924(e)(2)(B)(i), the issue is whether Virginia Code § 18.2-479(B) "otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B)(ii). The Virginia escape statute, Va. Code Ann. § 18.2-479(B) (West Supp. 2006), provides:

> Any person, lawfully confined in jail or lawfully in the custody of any court, officer of the court, or of any law-enforcement officer on a charge or conviction of a felony, who escapes, other than by force or violence or by setting fire to the jail, is guilty of a Class 6 felony.

The plain text of the Virginia statute punishes those who unlawfully and feloniously escape from confinement. We are, therefore, hard pressed to find that

such an escape does not "involv[e] conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(1)(B)(ii).

This court decided as much in *United States* v. *Hairston*, 71 F.3d 115 (4th Cir. 1995), when we held that felony escape from custody in North Carolina, *see* N.C. Gen. Stat. § 148-45(b)(1) (1987), constitutes a crime of violence under the ACCA. In that case, defendant jumped over a fence in a minimum security prison. He argued that felony escape from custody in North Carolina did not present a serious potential risk of physical injury because, in North Carolina, most felony escapes were undertaken by stealth. Hairston, 71 F.3d at 118. This court disagreed. We explained that any escape, even an escape by stealth, "inherently presents the serious potential risk of physical injury to another, "and concluded that an escape offense, however effected, is a "violent felony" under the categorical approach of 18 U.S.C. § 924(e)(1)(B)(ii). *Id.*; *see also Wardrick*, 350 F.3d at 455.

The same result obtains here. Defendant Mathias unlawfully and feloniously broke the bonds of custody when he walked away from the work release program. In this, he violated Virginia Code § 18.2-479(B), and committed a "violent felony" under the categorical approach, this court's decision in Hairston, and the second prong of 18 U.S.C. § 924(e)(1)(B).

Our conclusion finds support in the decisions of our sister circuits. Every court of appeals to consider the question has concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e). *See, e.g.*, *United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002) (holding that a "walkaway" escape is a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii)); United *States* v. *Abernathy*, 277 F.3d 1048, 1051 (8th Cir. 2002) (same); *United States* v. *Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999) (same); *United States* v. *Franklin*, 302 F.3d 722, 724-25 (7th Cir. 2002) (holding that escape is a

"violent felony" under 18 U.S.C. § 924(e)(2)(B)(ii) because it presents a "serious potential risk of physical injury"); *United States* v. *Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999) (same).[2]

B.

Mathias nonetheless contends that Hairston does not apply to this case and that his escape conviction cannot be a "violent felony" because Virginia Code § 18.2-479(B) defines escape as a "nonviolent" offense. He directs us to the Virginia statute's title, "Escape without force or violence or setting fire to jail," and argues that, unlike the North Carolina statute at issue in Hairston, Virginia Code § 18.2-479(B) "applies only to those who escape 'other than by force or violence.'" There are two problems with this approach.

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[2] In addition, the vast majority of our sister circuits (and this court) have concluded that, because escape "involves conduct that presents a serious potential risk of physical injury to another," it is a "crime of violence" as defined by the career offender sentencing guideline, USSG § 4B1.2(a). Compare USSG § 4B1.2(a) to 18 U.S.C. § 924(e)(2)(B)(ii). *See United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (failure to return to a halfway house is a crime of violence under USSG § 4B1.2); *United States* v. *Bryant*, 310 F.3d 550, 554 (7th Cir. 2002) (same); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002) (same); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002) (walkaway escape is a crime of violence under USSG § 4B1.2); *United States* v. *Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001) (per curiam) (same); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001) (same); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999) (same); *United States* v. *Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999) (escape, by its nature, qualifies as a crime of violence under USSG § 4B1.2); *United States* v. *Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996) (same). *But see United States* v. *Piccolo*, 441 F.3d 1084, 1089-90 (9th Cir. 2006) (walkaway escape is not a crime of violence under USSG § 4B1.2).

First, the fact that Mathias' conviction is labeled "nonviolent" by state law is beside the point. The point is simply that Congress, in enacting the ACCA, spoke in terms of risk, not result. Under the Armed Career Criminal Act, "it is not necessary that the defendant's specific conduct actually resulted in physical injury to another." *United States* v. *Moudy*, 132 F.3d 618, 620 (10th Cir. 1998). To the contrary, we examine only whether the nature of the offense presents "a serious potential risk of physical injury to another." Id. (quoting 18 U.S.C. § 924(e)(1)(B)(ii)); *Franklin*, 302 F.3d at 724.

There can be no doubt that a serious potential risk of physical injury is part and parcel of Mathias' escape conviction. *See* 18 U.S.C. § 924(e)(1)(B)(ii). For escape is a volatile enterprise. At the outset, there is always a chance that an escape attempt will be interrupted -- by a prison guard, work supervisor, or citizen bystander. *Hairston*, 71 F.3d at 118. Such an encounter leads to an "immediate and substantial risk that the situation will escalate to one involving physical force." *Id.* (quoting *United States* v. *Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993)). Even a walkaway escape is "a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so." *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). And, as this court has noted, the events surrounding an escape are "supercharged with the potential that, in being played out, physical force will be exerted against some person or some property." Aragon, 983 F.2d at 1313.

Even if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk. Individuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts. Indeed, the very fact of "escape invites pursuit; and the pursuit, confrontation." Jackson, 301 F.3d at 63.

As a result, the risk of violence that begins upon escape is an ongoing one, *see* United States v. Luster, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Bailey*, 444 U.S. 394, 413, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), and hair-raising recovery efforts by law enforcement officers far from unusual, *see, e.g.*, *Tison* v. Arizona, 481 U.S. 137, 144-45, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987) (noting use of lethal force, abduction, and murder to evade recapture); Garza v. Henderson, 779 F.2d 390, 397 (7th Cir. 1985) (noting gun battle prior to defendant's recapture).

Here, the Virginia Code defines a § 18.2-479(B) violation as escape "other than by force or violence . . . ." Even putting aside the fact that a risk of physical harm exists with every escape, the Virginia provision speaks only to what occurred at the time of flight -- not to the additional risk presented at the time of recapture. Upon escape, a prisoner becomes a fugitive from justice and the risk of physical injury continues so long as the escapee remains at large. In sum, "[e]ven the most peaceful escape cannot eliminate the potential for violent conflict when the authorities attempt to recapture the escapee." *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001). Since every escape, however executed, "involves conduct that presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(1)(B)(ii) (emphasis added), "[i]t is irrelevant . . . whether defendant was convicted under a state statute that defines escape as a nonviolent offense," Springfield, 196 F.3d at 1185.

Second, the fact that "violence" is not an element of Virginia Code § 18.2-479(B) is hardly dispositive. A statute need not proscribe "force" or "violence" in so many words for a conviction under its provisions to be deemed a violent one. And while Mathias is correct that the first clause of § 924(e)(2)(B) defines as violent felonies those which have "as an element the use, attempted use, or threatened use of physical force against the person of

another," he altogether ignores the second clause of § 924(e)(2)(B). That provision makes no mention of "force" or "violence" -- much less suggest that "force" or violence" is a required element. Rather, as we have noted above, the appropriate inquiry is risk: under § 924(e)(2)(B)(ii), violent felonies include those which "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another."

To adopt Mathias' approach and conclude that the second clause of § 924(e) only reaches conduct that is itself violent (and thus covered by the first clause of § 924(e)), would render the "otherwise" clause of § 924(e) superfluous. But it is "a classic canon of statutory construction that courts must 'give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous.'" *Discover Bank* v. *Vaden*, 396 F.3d 366, 369 (4th Cir. 2005) (quoting *United States* v. *Ryan-Webster*, 353 F.3d 353, 366 (4th Cir. 2003)); *see also Duncan* v. *Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (same).

III.

For the foregoing reasons, we conclude that Mathias' felony escape conviction under Virginia Code § 18.2-479(B) is a "violent felony" as defined by the ACCA. Mathias' sentence is affirmed.

AFFIRMED

UNITED STATES DISTRICT COURT
Eastern District of North Carolina – Northern Division

UNITED STATES OF AMERICA
v.
LINWOOD CHARLES MATHIAS

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**AMENDED JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

Case Number: **2:04CR00041-0003**

Date of Original Judgment: 1/18/2006

**RUDOLPH ASHTON**
Defendant's Attorney

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**Reason for Amendment:**

☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim P. 35(c))
☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
☒ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court Pursuant to 28 U.S.C. § 2255, 18 U.S.C. § 3559(c)(7), or Modification of Restitution Order

**THE DEFENDANT:**

☒ pleaded guilty to count(s) **1 - INDICTMENT**

☐ pleaded nolo contendere to count(s)_____ which was accepted by the court

☐ was found guilty on count(s) _____ after a plea of not guilty.

**Title & Section**
18 U.S.C. § 922(g)(1), 924 and 2

**Nature of Offense**
Felon in Possession of a Firearm and Aiding and Abetting

**Date Offense Concluded**
08/23/2004

**Count Number(s)**
1

☐ The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____.

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____

Defendant's USM No.: 24618-056

Defendant's Residence Address:

Raleigh NC

Defendant's Mailing Address:

Raleigh NC

02/10/2006

Date of Imposition of Judgment

/s/

Signature of Judicial Officer
U.S. DISTRICT JUDGE
TERRENCE W. BOYLE
Name & Title of Judicial Officer

2-10-2006
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 month(s).

☒ The court makes the following recommendations to the Bureau of Prisons:

Defendant is recommended for psychiatric treatment while incarcerated.

Defendant is recommended to FCI Butner, NC for incarceration.

Defendant is to receive credit for time served.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

☐ The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below). See Special Conditions of Supervision - Page 4.

**STANDARD CONDITIONS OF SUPERVISION**

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **Totals:** | $100.00 | $ | $ |

If applicable, restitution amount ordered pursuant to plea agreement $_____

## FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

## RESTITUTION

The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994,

until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | **Total Amount of Loss | Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|
| Totals: | $ | $ | |

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ See special instructions below.
B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or
C ☐ not later than ; or
D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall

request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g., equal, weekly, monthly, quarterly)* installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The special assessment fee is due in full immediately.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk, U.S. District Court, Attn: Financial Unit, Post Office Box 25670, Raleigh, NC 27611, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LINWOOD MATHIAS,
Defendant.

Case No. 2:04-CR-41-3-BO

SENTENCING HEARING

JANUARY 18, 2006

HONORABLE TERRENCE W. BOYLE, PRESIDING

APPEARANCES:

MRS. JANE JACKSON
ASSISTANT UNITED STATES ATTORNEY
310 NEW HERN AVENUE
RALEIGH, NC 27601
(FOR THE GOVERNMENT)

MR. RUDOLPH ASHTON, III
MCCOTTER, ASHTON & SMITH
3515 TRENT ROAD, NO. 10
NEW BERN, NC 28562
(FOR THE DEFENDANT)

SHARON K. KROEGER, COURT REPORTER
MACHINE SHORTHAND REPORTER, COMPUTER
AIDED TRANSCRIPTION

THE COURT: Linwood Mathias. Good afternoon, Mr. Mathias.

THE DEFENDANT: How are you doing?

THE COURT: Okay. Do you want to say anything about your sentence or the report?

THE DEFENDANT: I ain't really looked at the report because I was at Butner.

THE COURT: Do you want to come back another day and do it?

THE DEFENDANT: Oh, no. I will do it today.

THE COURT: Do you have anything you want to say about it?

THE DEFENDANT: No.

THE COURT: Well, the two issues that I see from the defendant are one, whether the escape is countable as a crime of violence.

MR. ASHTON: Correct, Your Honor.

THE COURT: And I am going to rule that it is. I have reviewed the material, but I have also consistently had this issue come up over my service, and I am satisfied that the law in the circuit is that an escape is counted as a crime of violence.

MR. ASHTON: For the record, could I be heard just a little further because I have some exhibits for the record in that regard.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:04-CR-41-03-BO

UNITED STATES OF AMERICA,
v.

LINWOOD CHARLES MATHIAS, Defendant.

ORDER

This matter is before the Court pursuant to Defendant's sentencing on January 18, 2006. At Defendant's sentencing hearing, the Court determined the applicable guideline range for these crimes was 188-235 months based on the fact that Defendant's crime and criminal history placed him at offense level 31, criminal history category VI. The Court then considered the factors listed in § 3553(a) of the guidelines. Having given thoughtful consideration to these advisory materials, the Court finds that the guideline is inconsistent with an appropriate sentence in this case. Defendant's history of treatment for psychological ailments militates against a sentence within the advisory guideline range. Accordingly, the Court will enter a non-guideline sentence.

Defendant is sentenced to custody with the bureau of prisons for a term of 180 months, with credit for time served. Defendant is also sentenced to a five-year term of supervised release, and is ordered to pay a $100 special assessment. The Court recommends that Defendant be incarcerated at FCI Butner, where he should receive psychiatric treatment.

SO ORDERED.

This the 14 day of February, 2006.

/s/
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

RECORD NO. 06-4109

In The United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
LINWOOD CHARLES MATHIAS, Defendant-Appellant.

ON APPEAL, FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT ELIZABETH CITY

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# BRIEF OF APPELLANT

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Rudolph A. Ashton, III
McCOTTER, ASHTON
& SMITH, P.A.
3515 Trent Road, No. 10
Post Office Box 12800
New Bern, NC 28562
(252) 635-1005

*Counsel for Appellant*

B. Discussion

How can a prior conviction of a crime which by its very definition and characterization is nonviolent be deemed a violent felony for federal sentencing purposes? This is the question that was posed to the District Court in the instant case by Defendant-appellant Linwood Charles Mathias. The answer determined whether Mr. Mathias would be subjected to a sentence with a maximum of ten (10) years or a mandatory minimum of fifteen (15) years.

Mr. Mathias readily conceded that his two prior convictions of felony burglary in the Commonwealth of Virginia were violent felonies by statutory definition and by guideline definition. Title 18 U.S.C. § 16; Guideline § 4B1.2. However he strenuously contends that his escape conviction in 1999 is not a violent felony.

The presentence report indicated that on April 15, 1999 Mathias was convicted of felony escape from custody by the Circuit Court of Portsmouth, Virginia. The factual basis in the presentence report indicated the defendant asserted that he walked away from a work release program. (JA 137). The Virginia Court Case Information Statement on Mathias shows that he was convicted of the above charge under Virginia Code § 18.2-479. (Defendant's

> pertaining to the offense of which the defendant was convicted. If that effort is unavailing, we consider whether the offense of conviction is a crime of violence in the abstract." 215 F.3d at 473.

Because the indictment initially charged robbery, it was unavailing. Therefore the Fourth Circuit considered the broader question of whether bank larceny, in the abstract, was a crime of violence. After analyzing the statute and comparing it to other offenses, the Fourth Circuit concluded that bank larceny was not a crime of violence in the abstract.

Likewise, it is respectfully contended that the Fourth Circuit in the instant case should analyze and compare the Virginia Code previously violated by Defendant-appellant Mathias to other statutes and offenses. Mathias was convicted of a statute entitled "escape without force or violence or setting fire to jail". The codification of the statute itself applies only to those who escape "other than by force or violence or by setting fire to the jail". Virginia Code § 18.2-479 (JA 87). Comparing it to the companion Virginia Code escape statute, wherein it specifically applies to "escape by force or violence", and specifically results in a consecutive sentence, Virginia Code § 18.2-477 (JA 88), it should be apparent that this distinction is crucial to the ultimate determination in this case. Applying the principles of United States v. Martin, it is respectfully urged that the statute under

which Defendant-appellant Mathias was convicted is not, in the abstract, a crime of violence.

If the escape is not considered a crime of violence, defendant Mathias is not an armed career criminal under Guideline § 4B1.4 and should not be subject to the mandatory minimum sentence of fifteen (15) years under Title 18 U.S.C. § 924(e). The case should be remanded for re-sentencing with a statutory maximum of ten (10) years, as promulgated in Title 18 U.S.C. § 922(g) and 924(a)(2).

## CONCLUSION

For the foregoing reasons, the Defendant-appellant Linwood Charles Mathias respectfully requests that he be awarded a new sentencing hearing and that he be re-sentenced without being classified as an armed career criminal to a maximum of ten (10) years.

## REQUEST FOR ORAL ARGUMENT

Defendant-appellant Linwood Charles Mathias respectfully requests this Court to set this matter for oral argument. Said Defendant contends oral argument should be heard because it may assist the Court in understanding some of the issues raised on appeal. Undersigned counsel is not aware of any Fourth Circuit cases interpreting Virginia Code § 18.2-479, and therefore considers this an issue

FILED
OCT 26 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-61

# In the Supreme Court of the United States

LINWOOD CHARLES MATHIAS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
ALICE S. FISHER
*Assistant Attorney General*
KIRBY A. HELLER
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether petitioner's prior conviction for escape constituted a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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# In the Supreme Court of the United States

No. 07-61

LINWOOD CHARLES MATHIAS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 482 F.3d 743.

### JURISDICTION

The judgment of the court of appeals was entered on April 13, 2007. The petition for a writ of certiorari was filed on July 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of North Carolina to being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 15 years of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-11a.

1. The Armed Career Criminal Act (ACCA) imposes a mandatory minimum term of 15 years of imprisonment on any person convicted of being a felon in possession of a firearm who had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1) (2000 & Supp. V 2005). ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

2. Petitioner robbed National Cash Advance, a payday lending service, while brandishing a loaded Glock 9 millimeter semi-automatic pistol. Following a high-speed chase, police arrested petitioner. Pet. App. 3a-4a.

Petitioner pleaded guilty to possessing a firearm after having been convicted of a felony. The Presentence Investigation Report determined that petitioner was subject to ACCA's 15-year minimum sentence because he had previously been convicted of three violent felonies (two burglaries and one escape). Petitioner conceded that the burglaries were violent felonies, but argued that the escape was not. The escape conviction was for violation of Va. Code Ann. § 18.2-479(B) (2004), which prohibits "any person lawfully confined in jail or lawfully in the custody of any court or officer thereof or of any law-enforcement officer on a charge or conviction of a felony," from "escap[ing], otherwise than by force or violence or by setting fire to the jail." See Pet. App. 4a-5a.

The district court overruled petitioner's objection and held that he was an armed career criminal. After determining that petitioner's advisory Sentencing

Guidelines range was 188-235 months of imprisonment, the court imposed a below-Guidelines sentence of 180 months of imprisonment, the statutory minimum. See Pet. App. 4a; Gov't C.A. Br. 5-6.

3. The court of appeals affirmed. Pet. App. 1a-11a. It held that the Virginia escape offense "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), and is thus a violent felony, because it prohibits persons from "unlawfully and feloniously escap[ing] from confinement." Pet. App. 6a. The court noted that "[e]very court of appeals to consider the question has concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e)." *Id.* at 7a.

The court of appeals rejected petitioner's contention that the Virginia offense at issue here is not a violent felony because it applies only to an escape "other than by force or violence or by setting fire to the jail." Va. Code. Ann. § 18.2-479(B) (2004). See Pet. App. 8a-11a. The court explained that ACCA looks to whether an offense poses a "risk" of physical injury to another, not whether it actually has that "result." *Id.* at 9a. Escape presents a serious potential risk of physical injury, the court explained, because "there is always a chance that an escape attempt will be interrupted," which would "lead[] to an immediate and substantial risk that the situation will escalate to one involving physical force." *Ibid.* (internal quotation marks and citation omitted). The court further reasoned that "[e]ven if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk." *Ibid.* "Individuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." *Ibid.*

## ARGUMENT

Petitioner argues (Pet. 10-19) that escape accomplished by a failure to return to confinement is not a violent felony under ACCA. That argument lacks merit and does not warrant this Court's review.

1. A prior conviction for a "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under ACCA if the offense "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Section 924(e) generally requires a "categorical approach" to determining whether or not a prior offense constitutes a "violent felony" within the meaning of Section 924(e)(2)(B). *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990). Under that "categorical approach," sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." *Ibid.*

That approach does not, however, "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007). "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Ibid.*

The crime of escape is a violent felony because, in the ordinary case, it poses a serious potential risk of physical injury. As the Tenth Circuit has explained:

> [E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which al-

> ways has the serious potential to do so. A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

*United States* v. *Moudy*, 132 F.3d 618, 620, cert. denied, 523 U.S. 1036 (1998) (quoting *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)); see Pet. App. 7a, 9a-10a.

Petitioner argues (Pet. 18-19) that a failure-to-report offense, unlike an escape accompanied by violence, creates no risk of injury in the ordinary case. Petitioner is incorrect. At the outset, the Virginia offense at issue here is not limited to failures to return to custody. Instead, it applies whenever "any person lawfully confined in jail or lawfully in the custody of any court or officer thereof or of any law-enforcement officer on a charge or conviction of a felony escapes, otherwise than by force or violence or by setting fire to the jail." Va. Code. Ann. § 18.2-479(B) (2004). Under the categorical approach, therefore, the nature of the particular escape at issue here—*i.e.*, that petitioner failed to return as opposed to escaping directly from a jail through the use of force—is not controlling. See Pet. App. 5a (rejecting petitioner's reliance on "the particular circumstances of his escape").

In any event, an escape accomplished by a failure to return to custody presents a serious potential risk of physical injury, even if that risk does not ripen into ac-

tual violence. Escape presents a "powder keg" situation. *Gosling*, 39 F.3d at 1142; Pet. App. 9a. "Even though initial circumstances of an escape may be non-violent, there is no way to predict what an escapee will do when encountered by authorities." *United States* v. *Turner*, 285 F.3d 909, 916 (10th Cir.), cert. denied, 537 U.S. 895 (2002).

Moreover, even if an escape succeeds and does not result in physical injury, the subsequent recapture of the escapee presents a serious potential risk of physical injury. While petitioner contends (Pet. 19) that apprehension of any felon presents some risk of injury, that risk is heightened for escapees. "Individuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." Pet. App. 9a.

2. As the court of appeals explained, "[e]very court of appeals to consider the question has concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e)." Pet. App. 7a; see, *e.g.*, *United States* v. *Maddox*, 388 F.3d 1356, 1368-1369 (10th Cir. 2004) (failure to return from work-release program), cert. denied, 544 U.S. 935 (2005); *United States* v. *Adams*, 442 F.3d 645, 647 (8th Cir. 2006) ("walkaway" escape), cert. denied, 127 S. Ct. 2095 (2007); *United States* v. *Golden*, 466 F.3d 612 (7th Cir. 2006) (failure to report to county jail), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007).

a. The Sixth Circuit recently drew a narrow exception to that general rule and held that, if a state escape offense is not considered a continuing offense, but instead is complete upon the defendant's departure from custody, it is not a violent felony under ACCA. *United States* v. *Collier*, 493 F.3d 731, 737 (2007); *United States* v. *Lancaster*, No. 06-5668, 2007 WL 2457448, at *5-*6

(Aug. 31, 2007). The Sixth Circuit stressed that escape is generally viewed as a continuing offense, and that only six States—not including Virginia—arguably take a contrary view. *Id.* at *6. Thus, any nascent conflict on the treatment of non-continuing escape offenses has limited scope and is not implicated here.

b. Petitioner relies (Pet. 10-12) on the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (2006), which concluded that a walkaway escape from a halfway house was not a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(2). *Piccolo*, 441 F.3d at 1086-1090. Significantly, however, *Piccolo* interprets the Sentencing Guidelines, not ACCA. Although some of *Piccolo*'s reasoning appears to signal that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of ACCA, to date the Ninth Circuit has not reached that question.[1]

Because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the

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[1] As the court of appeals noted (Pet. App. 8a n.2), the Ninth Circuit's interpretation of the Sentencing Guidelines conflicts with the decisions of every other court of appeals to consider the Guidelines question. See, *e.g.*, *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Thomas*, 361 F.3d 653, 657-660 (D.C. Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005); *United States* v. *Bryant*, 310 F.3d 550, 554 (7th Cir. 2002); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002), cert. denied, 538 U.S. 970 (2003); *United States* v. *Gay*, 251 F.3d 950, 954-955 (11th Cir. 2001) (per curiam); *United States* v. *Ruiz*, 180 F.3d 675, 676-677 (5th Cir. 1999); *United States* v. *Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999). The court of appeals did not, as petitioner contends (Pet. 10), "not[e] that its holding conflicts with" *Piccolo*. To the contrary, the court emphasized that the courts of appeals are in agreement on the ACCA question presented here. Pet. App. 7a. The court then observed in a footnote that the Ninth Circuit disagreed with other circuits on the interpretation of the Guidelines, which are not at issue here. See *id.* at 8a n.2.

courts" in applying the (now-advisory) Guidelines and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the Ninth Circuit's Guidelines decision in *Piccolo* does not warrant review of the statutory question presented in this case. See *Rita* v. *United States*, 127 S. Ct. 2456, 2464 (2007) ("The Commission's work is ongoing" and includes responding to court decisions.); *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

c. Petitioner's reliance (Pet. 12-16) on statements in other opinions is misplaced. *United States* v. *Thomas*, 333 F.3d 280, 282-283 (D.C. Cir. 2003), does not support petitioner's position. In that case, the D.C. Circuit simply reserved the question whether a walkaway escape would qualify as a crime of violence under Guidelines § 4B1.2. That court later held, albeit in a decision vacated on other grounds, that such escapes are violent felonies. *United States* v. *Thomas*, 361 F.3d 653, 658 (2004), vacated on other grounds, 543 U.S. 1111 (2005). Those decisions are distinguishable because they interpret the Guidelines, but they are fully consistent with the decision below in any event.

Petitioner misquotes (Pet. 14) *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007), petition for cert. pending, No. 06-11206 (filed May 8, 2007), for the proposition that holding an escape like petitioner's to be a violent felony is an "embarrassment to the law." Instead, the Seventh Circuit—which held that all escapes are violent felonies—considered it embarrassing to have

to speculate about the risk of physical injury from various types of escapes, as opposed to relying on statistics. 473 F.3d at 726-727. While statistics may be helpful, they are not required. See *James*, 127 S. Ct. at 1598. And when statistics are not available, courts must necessarily rely on the types of considerations discussed above.[2]

3. This Court has recently denied petitions for writs of certiorari presenting virtually the same question as the petition in this case. See, *e.g.*, *Brooks* v. *United States*, 127 S. Ct. 3003 (2007) (No. 06-9681); *Flowers* v. *United States*, 127 S. Ct. 2935 (2007) (No. 06-9220); *Adams* v. *United States*, 127 S. Ct. 2095 (2007) (No. 06-6541); *Ballard* v. *United States*, 127 S. Ct. 2094 (2007) (No. 06-5729). The Court should deny this petition as well.

Alternatively, the Court may wish to hold the petition pending its decision in *Begay* v. *United States*, cert. granted, No. 06-11543 (Sept. 25, 2007), which presents the question whether driving while intoxicated is a "violent felony" under ACCA. While this case and *Begay* involve different crimes, they both involve the question whether a particular crime "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Thus, this Court may wish to hold this petition for *Begay*, or may conclude

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[2] Petitioner relies (Pet. 12-13) on concurring opinions in *United States* v. *Adkins*, 196 F.3d 1112 (10th Cir. 1999), cert. denied, 529 U.S. 1030 (2000), and *United States* v. *Taylor*, 489 F.3d 1112 (11th Cir. 2007). But those decisions affirmed ACCA-enhanced sentences based in part on prior escape convictions, and those circuits have also held that escape convictions of all types are violent felonies under ACCA. See, *e.g.*, *Moudy*, *supra*; *Taylor*, 489 F.3d at 1114 & n.3.

that the differences between the cases make it unnecessary to do so.

## CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's disposition of *Begay* v. *United States*, No. 06-11543, and then disposed of as appropriate in light of this Court's decision in that case.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*
ALICE S. FISHER
*Assistant Attorney General*
KIRBY A. HELLER
*Attorney*

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IN THE
# Supreme Court of the United States

LINWOOD CHARLES MATHIAS,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## REPLY BRIEF FOR PETITIONER

Rudolph Alexander Ashton, III
McCotter, Ashton & Smith, PA
P.O. Box 12800
New Bern, N.C. 28561
(252) 635-1005

Robert A. Long, Jr.
*Counsel of Record*
Theodore P. Metzler, Jr.
Nicholas Cartier
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

November 2007

*Counsel for Petitioner*

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## REPLY BRIEF FOR PETITIONER

The court of appeals held that Petitioner's conviction for escape "other than by force or violence" based on his failure to return from a work release program is a violent felony for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Respondent does not deny that there is a circuit split over whether a conviction for an "escape" crime that punishes a walkaway escape or a failure to return to a halfway house is categorically a violent felony under the ACCA. Indeed, Respondent acknowledges that after the petition was filed in this case the Sixth Circuit issued two decisions holding that walkaway escapes are *not* always violent felonies under the ACCA. Br. in Op. 6-7.

The Fourth Circuit's opinion in this case also conflicts with the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (2006), which holds that a conviction under a statute that punishes walkaway escapes is not categorically a crime of violence for purposes of the career offender provisions of the federal Sentencing Guidelines. *Piccolo* involved the definition of "crime of violence" under the Sentencing Guidelines, but that definition is materially identical to the definition of "violent felony" in the ACCA and the courts of appeals uniformly construe the two terms to have the same meaning. As Respondent concedes, *Piccolo* indicates "that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of ACCA." Br. in Op. 7.

In addition to the decisions of the Sixth and Ninth Circuits, a growing chorus of judges from the Seventh, Tenth, Eleventh, and District of Columbia Circuits have disagreed with the Fourth Circuit's approach in this case. *See* Pet. 12-16. Review by this Court is warranted to resolve the widening dispute on this important and recurring issue.

## I. The Disagreement Among The Circuits Warrants This Court's Review.

1. Since the petition in this case was filed, the Sixth Circuit has issued two opinions analyzing whether walkaway escapes are violent felonies under the ACCA. In *United States* v. *Collier*, the court held that a conviction under a Michigan statute was *not* a violent felony. 493 F.3d 731 (6th Cir. 2007). The *Collier* defendant's "escape" involved "simply stepping off a public Greyhound bus – where he was unaccompanied by any correctional officials – and failing to report to the facility to which he was being transferred." *Id.* at 734-35. The court stated, "We doubt that a statute covering this 'failure to report' variety of escape necessarily 'involves conduct that presents a serious potential risk of physical injury to another.'" *Id.* at 735, quoting 18 U.S.C. § 924(e)(2)(B).

The court distinguished a prior case involving a Tennessee escape statute because that statute applied to prisoners "confined in a county workhouse or jail or city jail or municipal detention facility," *i.e.*, a "jailbreak." *Id.* at 734, distinguishing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999). The court observed that "the circuits are split on whether the distinction between a jailbreak and a 'walk away' is meaningful." *Id.* at 735 (footnote and citations omitted). As an additional reason for distinguishing *Harris*, the court noted that Tennessee courts have "consistently interpreted escape to be a 'continuing offense' that lasts until the defendant is re-apprehended, but Michigan courts have consistently held that escape is complete once the defendant leaves custody without having been discharged." *Id.* at 736. The court concluded that "it is inappropriate to speculate about" whether the defendant's recapture might involve violence "because that conduct simply is not part of the offense." *Id.*

Six weeks after *Collier*, another Sixth Circuit panel decided *United States* v. *Lancaster*, 2007 WL 2457448 (6th Cir. Aug. 31, 2007). The panel held that a Kentucky conviction for second-degree escape *is* categorically a violent felony under the ACCA, even though second-degree escape does not require the use or threat of force against another person. *Id.* at *2, *7.

The *Lancaster* court distinguished *Collier* on the ground that the "majority rule among the various jurisdictions is that the crime of escape is considered a continuing offense." *Id.* at *6 (citing 14 states and this Court holding escape is a continuing offense and 6 states holding that it is not).[1] Although Kentucky has not determined whether escape is a continuing offense, the court "anticipate[d] how the state supreme court would likely construe its state law," and held that escape is a continuing offense in Kentucky. *Id.* at *5 n.3, *7. On that ground, the court held that Kentucky second-degree escape categorically involves "conduct that presents a

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[1] At least two of the states identified in *Lancaster* as treating escape as a continuing offense have authority pointing in the other direction. *E.g.*, *Maynard* v. *State*, 652 P.2d 489, 492 (Alaska Ct. App. 1982) ("The offense of escape is complete when a person once in lawful custody, voluntarily removes himself from the custody without lawful authority."); *State* v. *Burton*, 2006 WL 1134215 (Del. Super. Ct. 2006) ("[A]ctions taken after the break or departure from custody are not relevant to the charge of escape-there generally is no 'continuous act' of escape."). In addition, federal cases have distinguished this Court's decision in *United States* v. *Bailey*, 444 U.S. 394 (1980), and held that escape is not continuing in some circumstances. *See United States* v. *Vowiell*, 869 F.2d 1264, 1268 (9th Cir. 1989), quoting *Orth* v. *United States*, 252 F. 566, 568 (4th Cir. 1918) ("When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete."); *see also United States* v. *Smithers*, 27 F.3d 142, 144 (5th Cir. 1994).

seriou[illegible]tential risk of physical injury to another." *Id.* at *7.[2]

The *Collier* and *Lancaster* decisions illustrate that the question presented continues to generate uncertainty and disagreement in the courts of appeals, and would benefit from this Court's review.[3] The Sixth Circuit's decisions hold that in some circumstances a conviction for escape under a statute that covers walkaways is not categorically a "violent felony." The law of the Sixth Circuit thus conflicts with the Fourth Circuit's decision in this case that "any escape, even an escape by stealth, inherently presents the serious potential risk of physical injury to another." Pet. App. 7a (internal quotation marks omitted).

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[2] Although the Virginia courts do not appear to have ruled on whether a violation of Va. Code § 18.2-479 is "continuing," there is reason to think they would hold that it is not. When deciding whether a crime is "continuing" for venue purposes, Virginia courts require that all elements of the crime must have been committed in the jurisdiction for venue to be proper. *Thomas* v. *Commonwealth*, 563 S.E.2d 406, 409 (Va. Ct. App. 2002) (holding that venue was improper for "speeding to elude resulting in serious bodily injury" because serious bodily injury did not occur in the county where the crime was tried). A violation of Va. Code § 18.2-479 requires both "lawful confine[ment]" and "escape[]." Under Virginia's approach, these elements would occur in a single county, and thus escape would not be a "continuing" offense.

[3] The issue has arisen in multiple cases since the petition in this case was filed. *E.g.*, *United States* v. *Avalos*, 2007 WL 3076918 (10th Cir. Oct. 23, 2007); *United States* v. *Parks*, 2007 WL 2874006 (8th Cir. Oct. 4, 2007); *United States* v. *Ingram*, 2007 WL 2492463 (8th Cir. Sept. 6, 2007); *United States* v. *Pratt*, 496 F.3d 124, 130 (1st Cir. 2007); *United States* v. *McNack*, 2007 WL 2007583 (10th Cir. July 12, 2007) (unpublished); *United States* v. *Summers*, 238 Fed. Appx. 552 (11th Cir. July 12, 2007) (unpublished).

2. The Fourth Circuit's decision also conflicts with the Ninth Circuit in *United States* v. *Piccolo*, 441 F.3d 1084, 1086 (9th Cir. 2006). *Piccolo* held that a conviction under the federal escape statute, which covers nonviolent walkaway escapes, was not a "crime of violence" for purposes of the Sentencing Guidelines. *Id.* at 1088-90. Respondent argues that there is not any conflict with *Piccolo*, because that case interpreted the Sentencing Guidelines rather than the ACCA. But Respondent does not deny that the courts of appeals uniformly construe the definitions of "violent felony" in the ACCA and "crime of violence" in the Sentencing Guidelines to be materially identical. *E.g.*, *United States* v. *Pratt*, 496 F.3d 124, 130 (1st Cir. 2007) ("We have also held that 'the definitions of "crime of violence" and "violent felony" are mirror images of each other and that, therefore, cases construing one such term should be considered instructive with respect to the scope of the other.'" quoting *United States* v. *Richards*, 456 F.3d 260, 263 n.2 (1st Cir. 2006)); *see also* Pet. 6 (citing additional cases). To the contrary, Respondent acknowledges that "*Piccolo*'s reasoning appears to signal that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of ACCA," and suggests no basis upon which the Ninth Circuit could distinguish the ACCA from the Sentencing Guidelines. Br. in Op. 7. Consequently, the Ninth Circuit's decision in *Piccolo* provides a basis for this Court's review.[4]

3. The circuit split in this case is augmented by a growing chorus of judges who disagree with the Fourth Circuit's approach. Pet. 12-16; *see also, e.g.*, *United States*

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[4] The Court has granted review in prior cases in which a split in authority involves the Sentencing Guidelines but extends beyond the Guidelines themselves. *E.g.*, *Toledo-Flores* v. *United States*, 547 U.S. 1054 (2006); *Buford* v. *United States*, 532 U.S. 59, 63 (2001); *Stinson* v. *United States*, 508 U.S. 36, 39-40 (1993).

v. *Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) (Posner, J.); *United States* v. *Springfield*, 196 F.3d 1180, 1186 (10th Cir. 1999) (McKay, J., concurring) (rejecting the conclusion that "escape is necessarily always a violent crime"); *United States* v. *Taylor*, 489 F.3d 1112 (11th Cir. 2007) (Hill, J., concurring) ("I wish to express my agreement with those who reject the rule that escape is categorically a violent felony.").

Contrary to Respondent's assertion, Petitioner did not "misquote" the opinion in *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007). Br. in Op. 8-9. In that case, Judge Posner's opinion for the court stated: "As an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often 'involves conduct that presents a serious potential risk of physical injury to another.'" 473 F.3d at 725. The court then reviewed decisions holding that escape is categorically a violent felony, and noted that each involved "failure to return to a halfway house – a type of failing to return that seems even less violence-prone than failing to show up at prison, because a violent prisoner would be less likely to be serving a part of his sentence in a halfway house – or a 'walkaway' escape, which does not involve breaking out of a building or wrestling free of guards." *Id.* at 726. The court then stated:

> We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.

*Id.* Judge Posner noted that the possibility of violence during recapture is "conjecture floating well free of any

facts." *Id.* at 727. To be sure, Judge Posner's opinion for the Seventh Circuit states that "it is an embarrassment to the law when judges base decisions of consequence on conjectures." *Id.* at 726. But the opinion also concludes that decisions in cases such as this *are* based on conjecture — including "conjecture floating well free of any facts." *Id.* at 727.

## II. Walkaway Escapes Are Not Categorically Violent Felonies.

In arguing that all escapes are violent felonies, Respondent relies on two arguments that apply to "jailbreak" scenarios but not to walkaways or failures to return.

Under the "categorical approach" adopted by this Court in *Taylor* v. *United States*, a court generally will "look only to the fact of conviction and the statutory definition of the prior offense," as opposed to the particular facts underlying the crime. 495 U.S. 575, 600, 602 (1990) (footnote omitted). "[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*, presents a serious potential risk of injury to another." *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007) (emphasis added).

Respondent asserts that escape poses a serious potential risk of physical injury because "every escape scenario is a powder keg." Br. in Op. 4-5, quoting *United States* v. *Moudy*, 132 F.3d 618, 620 (10th Cir. 1994). While this rationale makes sense as applied to a "jailbreak" scenario, it makes very little sense as applied to escapes by unsupervised individuals outside of prison. Such escapes, by their nature, are likely to involve a relatively low risk of confrontation with law enforcement officers. An individual who escapes in such circumstances is unlikely to have the "supercharged emotions" of an individual who engages in a jailbreak. *Id.*

Respondent suggests that the "ordinary" escape case involves a jailbreak rather than a walkaway. Br. in Op. 4. Common sense and empirical evidence indicate that the opposite is true. *First*, a walkaway escape has a greater chance of success and poses less risk of harm than a jailbreak. *Second*, as Judge Posner noted in *Chambers*, recent research shows that almost 90 percent of all escapes are walkaways. *Chambers*, 473 F.3d at 727 (citing Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data*, 85 Prison J. 270, 278 (2005)).[5]

Because walkaways and failures to return are more common than jailbreaks, they cannot be dismissed as outside the "ordinary case" of escape. These crimes do not present a serious potential risk of injury to another and accordingly are not violent felonies under the ACCA.

Respondent also asserts that "[i]ndividuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." Br. in Op. 6, quoting Pet. App. 9a. Again, the assertion may be true for jailbreak escapees, but there is no basis for assuming that a prisoner who has taken only the minimal risk necessary to fail to return from unsupervised release would run the risk of resisting rearrest. Moreover, as the D.C. Circuit has noted, this argument proves too much, because whenever a law enforcement officer is called upon

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[5] According to reported decisions of the Virginia Parole Board, parole was revoked for failure to report or absconding from supervision seventy-five times in 2005. *See* Virginia Parole Board Monthly Decisions, http://www.vadoc.virginia.gov/resources/vpb/decisions/default.shtm (tables reporting monthly decisions and decision codes). During that same period, there were only two escapes from secure facilities in Virginia. *See* Virginia Dep't of Corrs., Statistical Summary FY 2005, http://www.vadoc.virginia.gov/about/facts/research/new-statsum/fy05statsummary.pdf.

to arrest an individual, there is a possibility that the individual will resist and someone will be injured. *See United States* v. *Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003) ("While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of any lawbreaker.").

## III. It Is Not Apparent That This Case Should Be Held For *Begay* v. *United States*.

Respondent suggests that the Court may wish to hold this case pending its decision in *Begay* v. *United States*, No. 06-11543, *cert granted* Sept. 25, 2007. Br. in Opp. 9. It is not apparent to Petitioner that there is any reason to hold this case for *Begay*.

*Begay* presents the question whether driving while intoxicated is a "violent felony" under the ACCA. The crux of the issue in *Begay* appears to be whether interpretive canons such as *ejusdem generis* and *noscitur a sociis* limit the ACCA's requirement of "a serious potential risk of physical injury to another" to offenses similar to "burglary, arson, or extortion," or whether the risk of physical injury in driving while intoxicated is sufficient even though the crime is not ordinarily considered "violent."

In this case, in contrast, the crux of the issue is whether "escape" crimes categorically involve a serious potential risk of physical injury to another, even if the escape consists of failing to return to a halfway house or walking away from an unsupervised work release. It is not apparent to Petitioner that the Court's resolution of the question presented in *Begay* will shed significant light on the question presented here. Nor will it resolve the conflict among the circuits or silence the chorus of judges who have disagreed with the majority rule.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert A. Long, Jr.
*Counsel of Record*
Theodore P. Metzler, Jr.
Nicholas Cartier
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

Rudolph Alexander Ashton, III
McCotter, Ashton & Smith, PA
P.O. Box 12800
New Bern, N.C. 28561
(252) 635-1005

*Counsel for Petitioner*

November 2007